

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CHAUNCEY KING, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DONALD ALLEN SCOTT and BONITA KING,

Respondents-Appellants.

UNPUBLISHED

January 18, 2000

Nos. 213038,215625

Genesee Circuit Court

Family Division

LC No. 88-077399 NA

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

In these consolidated appeals, respondents Donald Scott and Bonita King appeal as of right from a family court order terminating their parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (g) and (j); MSA 27.3178(598.19b)(3)(a)(ii), (g) and (j). We affirm the termination order with respect to respondent Scott and remand for further proceedings with respect to respondent King.

I

We disagree with respondent Scott's claim that the family court erred in applying the doctrine of anticipatory neglect enunciated by this Court in *In re Dittrick*, 80 Mich App 219; 263 NW2d 37 (1977). Moreover, although the court noted that Scott's parental rights to another child had been terminated in a prior proceeding because of his failure to follow through with the requirements of his parent/agency agreement, the court did not rely solely on the *Dittrick* doctrine when terminating Scott's parental rights in this case. We are satisfied that the family court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence with respect to respondent Scott. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, respondent Scott failed to show that termination of his parental rights was clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Hall-Smith*, 222 Mich

App 470, 472-473; 564 NW2d 156 (1997). Thus, the family court did not err in terminating respondent Scott's parental rights to the child. *Id.*

II

We find no merit to respondent King's claim that the family court erred in finding that the child was without proper custody or guardianship and, therefore, subject to the jurisdiction of the court. MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1). Petitioner presented evidence that that King believed the hospital had given her the wrong baby, and that the baby she received had "stuff crawling out of its skin". King left the new baby with another person, who contacted Protective Services. In determining that the child came within the jurisdiction of the court, the court found that King had neglected the child by refusing to provide psychological, emotional, financial and medical support and had virtually abandoned the child.

This Court has held that, "[u]ntil there is a demonstration that the person entrusted with the care of the child by that child's parent is either unwilling or incapable of providing for the health, maintenance, and well being of the child, the state should be unwilling to interfere." *In re Curry*, 113 Mich App 821, 826-827; 318 NW2d 567 (1982). Here, the fact that the person with whom the child was left by King made a referral to Protective Services demonstrates that the person was either unwilling or incapable of providing for the health, maintenance, and well being of the child. Therefore, the family court did not err in determining that the child was without proper custody or guardianship when it took jurisdiction of the child.

There also is no merit to respondent King's argument that the family court clearly erred in finding that her mental condition continued to exist and may have deteriorated. Petitioner presented evidence that King has a history of mental illness, has been hospitalized several times, has been diagnosed with paranoid schizophrenia, and that people with this disorder regress over time without treatment and medication. When a Protective Services worker visited King's home before the hearing, it appeared from King's bizarre statements and conduct that she was irrational and unstable, that King would not reveal any information about the child to the worker, and that King had left the child with another person because she believed the hospital had given her the wrong child. In view of this evidence, the court did not clearly err in finding that King's mental condition continued to exist and may have deteriorated.

III

Respondent King further argues that her due process rights were violated because she did not receive notice of the permanent custody petition and hearing. Failure to provide notice of a termination hearing by personal service on a noncustodial parent as required by statute, MCL 712A.12; MSA 27.3178(598.12), is a jurisdictional defect that renders all proceedings in the trial court void. *In re Atkins*, __ Mich App __; __ NW2d __ (No. 212407, issued 8/17/99); *In re Gillespie*, 197 Mich App 440, 442; 496 NW2d 309 (1992); *In re Adair*, 191 Mich App 710, 713-714; 478 NW2d 667 (1991). See also MCR 5.920; MCR 5.921(B)(3); MCR 5.974(C).

Respondent King did not appear at the termination hearing. With regard to the issue of service, the family court stated on the record at the start of the hearing that “the court file contains a Proof of Service indicating that Benita King was personally served on March 20, 1998, with a copy of the Petition in this matter.” However, no such document appears in the lower court file.

The burden is on petitioner to establish that proper service of process has been accomplished. See *In re Adair, supra* at 715. Although the court rules do not explicitly delineate the manner for establishing proof of service in a juvenile proceeding, the general court rules provide that proof of service may be made by:

(1) written acknowledgment of the receipt of a summons and a copy of the complaint, dated and signed by the person to whom the service is directed or by a person authorized under these rules to receive the service of process;

(2) a certificate stating the facts of service, including the manner, time, date, and place of service, if service is made within the State of Michigan by

(a) a sheriff,

(b) a deputy sheriff or bailiff, if that officer holds office in the county in which the court issuing the process is held,

(c) an appointed court officer,

(d) an attorney for a party; or

(3) an affidavit stating the facts of service, including the manner, time, date, and place of service, and indicating the process server’s official capacity, if any.

The place of service must be described by giving the address where the service was made or, if the service was not made at a particular address by another description of the location. [MCR 2.104(A)(1)-(3).]

Here, neither a written acknowledgment of service nor an affidavit of service appear in the lower court file. With respect to respondent King, the file contains only a return of service signed by Deputy Sheriff Gordon Herron,¹ indicating that King was personally served with a “summons order to appear child protective proceeding,” “petition,” and “attachments” on March 6, 1998. Generally, clear and convincing evidence, with substantial corroboration of a party’s denial of service, is required in order to impeach an officer’s return of service. *Alpena National Bank v Hoey*, 281 Mich 307, 312; 274 NW 803 (1937). See also *Garey v Morley Brothers*, 234 Mich 675, 677; 209 NW 116 (1926). Here, however, it is unclear from the record if the above-referenced proof of service pertains to the summons and petition for the permanent custody hearing because the nature of the petition is not identified in the proof of service. Furthermore, the family court’s on-the-record statement regarding service at the termination hearing refers to service allegedly made on March 20, 1998, whereas the proof of service filed by Deputy Sheriff Herron refers to service on March 6, 1998. We do not view

the family court's on-the-record statement, standing alone, as sufficiently establishing competent proof of service in the absence of proper documentation describing both the fact and particulars of service. Thus, we are not persuaded from the record before us that respondent King received proper service of the permanent custody petition and notice of hearing.

Given the unsettled nature of the record with regard to the issue of service, we find it appropriate to remand this case for the limited purpose of determining if respondent King received proper service of the summons and permanent custody petition, and notice of the hearing. If the trial court finds that there was no service, then King is entitled to a new trial. If the trial court finds that there was service, then this matter may be closed.

Affirmed with respect to respondent Scott in Docket No. 213038. Remanded for further findings with respect to respondent King in Docket No. 215625. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad

¹ A deputy sheriff is not required to provide proof of service by affidavit and, therefore, the fact that the proof of service is not notarized does not affect its validity. See 2 Dean & Longhofer, Michigan Court Rules Practice, pp 104-105; *Windolph v Joure*, 323 Mich 1, 5-6; 34 NW2d 529 (1948).